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March 13, 2015

The Honorable Chris West  
303 House Office Building  
Annapolis, Maryland 21401-1991

Dear Delegate West:

You have asked for advice concerning the validity of certain provisions of the Natalie M. LaPrade Medical Marijuana Commission Law. Specifically, you have asked whether these provisions are unconstitutional. It is my view that these provisions must be administered in accordance with the United States Constitution, but, in the event that they were found to be unconstitutional, they would be severable from the remainder of the law.

Health - General Article, § 13-3309(a)(9)(i) provides that, in licensing growers of medical marijuana, the Medical Marijuana Commission ("the Commission") shall:

1. Actively seek to achieve racial, ethnic, and geographic diversity when licensing medical marijuana growers; and
2. Encourage applicants who qualify as a minority business enterprise, as defined in § 14-301 of the State Finance and Procurement Article.

Health - General Article, § 13-3310(c), which relates to the licensing of dispensaries, provides that the Commission shall:

- (2) Actively seek to achieve racial, ethnic, and geographic diversity when licensing dispensaries.

In the bill review letter on House Bill 881 (Chapter 240) and Senate Bill 923 (Chapter 256) of 2014, the Attorney General advised "that these provisions be implemented consistent with the provisions of the United States Constitution as described in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013)." See Form Bill Review letter dated April 11, 2014. It is well-established that a race-conscious affirmative action program is subject to strict scrutiny and will be upheld by the courts only if it is narrowly tailored to achieve a compelling public purpose. 91 *Opinions of the Attorney General* 181, 182 (2006), citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488

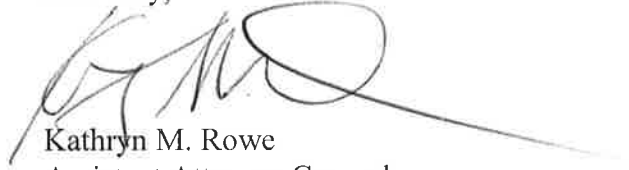
U.S. 469 (1989). The *Croson* case held that a governmental entity has a compelling interest in remedying identified past and present race discrimination. *Id.* at 492, 509. For this interest to be compelling, the government must be able to identify discrimination in the relevant market in which the entity is a participant. *Id.* at 501-504. In addition, there must be a “strong basis in evidence” of that discrimination at the time the program is established. *Id.* at 500, 510. In the context of government contracting, which was the subject of *Croson*, this requires a study showing a “significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *HB Rowe Co., Inc. v. Tippet*, 615 F.3d 233, 241 (4th Cir. 2010). The *Fisher* case, for our purposes, confirms that the test set out in *Croson* still stands, and that a Court will closely scrutinize a government’s justification of a race-conscious program and its evidence in support of that program.

The provisions of *Croson* and *Fisher* apply to ethnicity in the same way as race. They do not, however, apply to geographically conscious programs. Thus, the law should be read to have full force to the extent that it requires the Commission to seek geographic diversity to the extent possible. Moreover, it is not unconstitutional to encourage businesses of any type, including those in the minority business enterprise program, to apply to participate in any type of government program. Constitutional limits, however, would prevent the Commission from conducting race- or ethnicity conscious licensing in the absence of a disparity study showing past discrimination in similar programs. I am aware of no study that would cover grower or dispensary licensees, or even licensing in general. Most State licensing programs license everyone who meets the licensing qualifications, and thus would not give rise to the ability to pick some and not others. As a result, the efforts of the Commission to seek racial and ethnic diversity among growers and dispensaries would have to be limited to broad publicity given to the availability of the licenses and encouragement of those from various groups.

Even if the provisions are implemented in a way that leads to a determination of their invalidity, however, it is my view that they are severable from the remainder of the law. The primary inquiry in this determination is what would have been the intent of the legislature had they known that these provisions could not be given effect. *Davis v. State*, 294 Md. 370, 383 (1982). Generally courts will assume “that a legislative body generally intends its enactments to be severed if possible.” *Id.*; see also Article 1, § 23 (“[t]he provisions of all statutes . . . are severable unless the statute specifically provides that its provisions are not severable.”). Thus, “when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion.” *Id.* at 384. In this case, it is clear that the program is “complete and capable of execution,” *Migdal v. State*, 358 Md. 308, 324 (2000), without the diversity provisions. Therefore, it is our view that, if found invalid, the diversity provisions would be treated as severable and the remainder of the law would remain in effect.

The Honorable Chris West  
March 13, 2015  
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Sincerely,

A handwritten signature in black ink, appearing to read 'K. M. Rowe', with a long horizontal flourish extending to the right.

Kathryn M. Rowe  
Assistant Attorney General

KMR/kmr  
west01.wpd